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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the statutory provision that allows a claimant to petition the Customs Service for discretionary remission or mitigation of penalties for violations of the customs laws creates a property interest subject to the requirements of the Due Process Clause of the Fifth Amendment.

2. Whether, assuming that due process requirements apply to the remission decision, they include a requirement of prompt disposition that was violated in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 729 F.2d 657. The previous opinion of the court of appeals (Pet. App. 15a-32a) is reported at 660 F.2d 1319.[1] The findings of fact and conclusions of law of the district court (Pet. App. 35a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1984. A petition for rehearing was denied on September 18, 1984 (Pet. App. 13a-14a). On December 6, 1984, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to January 15, 1985. The petition was filed on that date and was

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[1] That opinion as reported does not contain the modifications that the court of appeals made to its decision in denying the government's petition for rehearing. See Pet. App. 33a-34a.

granted on April 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

In March or April 1974, respondent, an automobile dealer, purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada

with the intention of bringing it into the United States (Tr. 13, 20-21). For this purpose, respondent had the automobile registered in the State of California and obtained California license plates for it (Pet. App. 36a). On January 20, 1975, respondent arrived in Vancouver to take possession of the vehicle and obtained a release form from Canadian customs authorizing him to transport it through Canada to the United States-Canadian border in British Columbia. Canadian customs officers instructed him to deliver the form to the Canadian customs border station before leaving Canada. Tr. 27-30, 151; Pet. App. 16a-17a, 36a.

Later that day, respondent drove south toward the United States border. After failing to stop first at the Canadian customs station to surrender the release form as he had been instructed, he arrived at the United States border checkpoint at Blaine, Washington at approximately 5:00 p.m. Tr. 31-32; Pet. App. 17a, 36a-37a.[2]

Earlier that day Canadian customs officials had alerted United States customs officers at the Blaine checkpoint that a Jaguar Panther automobile had been off-loaded at the Vancouver ocean terminal and might be driven across the border into the United States (Tr. 110-111). As respondent drove up to the Customs primary inspection point, the inspector on duty recognized that the automobile matched the description given by the Canadians. After the inspector inquired whether respondent was a United States citizen and how long he had been outside the United States, he asked whether respondent had "purchas[ed] or acquir[ed] anything outside the United States" (Tr. 113). When respondent answered negatively, the inspector asked him whether he had anything to declare to Customs, "to make sure there was no mistake about what information was needed" (Tr. 114). Respondent indicated that the only property in his pos-

[2] Respondent testified that he inadvertently passed the Canadian customs building because of poor visibility and inadequate directions (Tr. 31-32; Pet. App. 17a).

session was his personal belongings (*ibid.*). Pet. App. 17a, 37a.[3]

Following this exchange, the inspector directed respondent to park his car and to enter the Customs station. He then referred the case to his supervisor, giving as the reason for additional inquiry respondent's failure to declare the vehicle (Tr. 115-116). When the supervisory inspector asked respondent why he had failed to declare his automobile, respondent answered that he did not think he was required to. The officer then informed him that the vehicle was being seized because of his failure to declare it. Tr. 144-145, 148-149; Pet. App. 17a-18a. See 19 U.S.C. 1497, 1602.

The supervisor then completed the necessary seizure documents and assisted respondent in preparing a "Petition for Remission or Mitigation of Forfeitures and Penalties Incurred." In his very brief, handwritten petition, respondent stated that he "had no intention of avoiding U.S. Customs duties" and explained that he had mistakenly arrived at the United States Customs office after attempting to locate Canadian customs for the purpose of surrendering his Canadian release form (J.A. 12; Pet. App. 18a). Upon completion of the necessary documents, the supervisor explained that respondent could obtain the release of his vehicle by posting a cash bond[4] and arranged for respondent to be transported to a local hotel (Tr. 51, 155-159). From there, respondent arranged to fly home in his private plane that was waiting in Seattle (Tr. 51-52).

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[3] During the hearing, respondent conceded that he knew he had to declare his automobile at the United States Customs station. He claimed, however, that he understood the Customs inspector's questions to relate exclusively to purchases or acquisitions made in Canada and that the inquiry thus did not refer to his automobile, since it had been purchased in Switzerland (Tr. 38-40).

[4] Customs officials have discretion to release a seized vehicle to a person claiming a "substantial interest therein" upon payment of the value of the vehicle. 19 U.S.C. 1614. The payment serves as a bond to cover any penalty assessed for failure to make the declaration required by law. See 19 C.F.R. 162.43, 162.44(b).

2. Two weeks later, on February 3, 1975, respondent posted a bond for $24,500, the appraised value of his car, and Customs returned the vehicle to him (Pet. App. 19a). On February 12, 1975, respondent filed with Customs a "Supplement to the Petition for Remission" in which he provided a detailed account of the circumstances surrounding his attempt to bring the automobile into this country. Respondent alleged for the first time that the Customs inspector had never inquired whether respondent had anything to declare; he also repeated his earlier claim that he fully intended to pay the duty on the automobile. J.A. 13-16. The filing contained no request that his petition be acted upon with expedition.

On February 25, 1975, the Seattle District Director of the Customs Service[5] informed respondent that, upon consideration of his petition and the reported facts, the penalty for failing to declare the car, in violation of 19 U.S.C. 1497, was being remitted to $3,600. The District Director therefore refunded $20,900 to respondent (J.A. 17). Respondent objected (J.A. 18-19) and obtained an administrative review of this determination (see 19 C.F.R. 171.33(b)), and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment (J.A. 20). Pet. App. 19a.

2. Respondent then filed the instant suit in the United States District Court for the Central District of California, seeking return of the $3,600 penalty and a declaration that the seizure of his automobile and the imposition of a penalty were unlawful. Respondent also sought injunctive relief ordering that his name be withdrawn or

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[5] By statute, the Secretary of the Treasury is authorized to act on petitions for remission or mitigation. 19 U.S.C. 1618. This authority has been delegated to District Directors of the Customs Service in cases where the total value of the merchandise forfeited does not exceed $25,000 (19 C.F.R. 171.21), and that amount was recently raised to $100,000 for some cases (50 Fed. Reg. 7335 (1985)). The estimated value of respondent's car, $24,500, thus fell within the District Director's authority to act on petitions for remission or mitigation.

deleted from any Customs Service computer or list of individuals who have attempted to violate the customs laws. C.A. App. 2-9.[6] After an evidentiary hearing, the district court found that respondent had violated 19 U.S.C. 1497 by failing to declare his automobile and that, accordingly, the seizure of the vehicle by Customs was proper and the automobile was subject to forfeiture (Pet. App. 39a). The district court also found that the remission and mitigation procedures followed by Customs "were proper" (*ibid.*).

3. The court of appeals affirmed the district court's determination that the seizure of respondent's vehicle was proper, finding that "[t]he record fully supports the district court's conclusion that [respondent] attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so." Pet. App. 20a. It reversed, however, the district court's holding that the procedures followed by Customs in acting upon respondent's petition for mitigation were proper. Proceeding from the premise that in cases involving the seizure of an automobile "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618" (Pet. App. 30a), it held that "[t]he [one month] delay in processing [respondent's] petition for remission or mitigation

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[6] "C.A. App." refers to the excerpt of record filed with the court of appeals. In its answer, in addition to defending the lawfulness of its action, the government asserted that the remission and mitigation sought and received by respondent was "a final settlement, accord and satisfaction" binding on him (C.A. App. 22). In addition, the government filed a contingent counterclaim seeking recovery of the full $24,500, in accordance with 19 U.S.C. 1497, in the event the district court found the administrative mitigation proceedings invalid. The counterclaim was based upon the theory that, if the administrative settlement were found to be invalid, the government was free to seek forfeiture of the full value of the vehicle as a penalty for failure to declare it, just as if no administrative relief had ever been granted (C.A. App. 22-23, 32). The district court entered a judgment in favor of the government on the merits and accordingly denied the contingent counterclaim and found it unnecessary to reach the settlement question (Pet. App. 39a).

* * * violated his due process right to prompt consideration of his claim" (*id.* at 32a).[7] The court then went on to articulate specific standards to be used by Customs prospectively to assure the prompt processing of petitions for administrative relief. The court stated that Customs should, unless "unusual circumstances" require a brief delay, act on all petitions within 24 hours of receipt and provide the claimant an opportunity to make an oral appearance to argue his claim (*id.* at 31a-32a & n.16, 33a-34a).

4. The government sought certiorari, and this Court granted the petition and vacated and remanded for reconsideration in light of *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983). 462 U.S. 1101 (1983). On remand, the court of appeals adhered in substantial part to its previous decision (Pet. App. 1a-12a). The court found that this Court's decision in *$8,850* "reinforce[d]" its view that due process rights attach to the processing of the petition for remission, and therefore the court reaffirmed its earlier view that due process requires Customs to dispose of those petitions promptly (*id.* at 7a).

With respect to the standards it had established for considering petitions for remission or mitigation, the court of appeals drew back from the 24-hour limit that it had imposed, noting that *$8,850* had indicated that a due process inquiry should be a flexible one that depends on the facts of a particular case (Pet. App. 8a). Relying

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[7] The court of appeals relied heavily upon the decision of the Second Circuit in *Lee* v. *Thornton*, 538 F.2d 27 (1976), in concluding that due process requires prompt disposition by Customs of administrative petitions for remission or mitigation of vehicle forfeitures. In *Lee*, the court, relying upon the balancing analysis in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that when vehicles are seized as security for a penalty or for forfeiture, action on petitions for remission or mitigation should be required within 24 hours, unless a hearing on probable cause is requested by the claimant, in which event the hearing should be conducted within 72 hours of the seizure. 538 F.2d at 33.

on *$8,850*, the court adopted the four-factor analysis of *Barker* v. *Wingo*, 407 U.S. 514 (1972), as the appropriate framework for considering a claim of violation of due process through delay in processing a petition for remission or mitigation (Pet. App. 8a-9a & n.6).

The court of appeals remanded the case to the district court to consider those factors, but it deemed it appropriate to make several observations to assist the district court. Stating that "the propriety of the delay may turn to a great extent upon the nature of the item that has been seized," the court of appeals noted the "special hardships" imposed on persons deprived of their automobiles, which are "particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point" (Pet. App. 10a). Although the reasons for the delay were not previously at issue in the district court, the court of appeals also stated that the record indicated "no obvious reason" for the one-month delay and that it "appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition" (*id.* at 11a). With respect to the third *Barker* factor, the court noted that respondent had promptly filed a petition for remission, "which seems a sufficient assertion of his rights" (*ibid.*). Finally, the court noted that the prejudice to the claimant from the delay could include "expenses resulting from a seizure of his vehicle, sudden disruption of travel plans [and] inconvenience" (*id.* at 12a).

SUMMARY OF ARGUMENT

I.

It is well established that the protections of the Due Process Clause do not extend to every government decision that affects individual interests. By its terms, the Clause applies only to deprivations of "life, liberty, or property." "Property" interests are not created by the Constitution; they are created by the state through the conferral of rights by law. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Numerous decisions of this Court have made clear that only when the government

binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts does it establish a "property" or "liberty" interest covered by the Due Process Clause. Thus, for example, the Court has held that an inmate may not challenge on due process grounds the failure of the Connecticut Board of Pardons to commute his life sentence even though 75% of all commutation requests were granted by the Board. *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981). Because the Board's decision was committed wholly to its discretion, the inmate's petition was "nothing more than an appeal for clemency" (*id.* at 465) that could generate no due process protection regardless of the frequency with which relief was granted.

Like the commutation remedy in *Dumschat*, the relief of remission or mitigation of forfeiture is purely a matter of executive grace that does not implicate due process protections. The statute creating the remedy provides that the Secretary of the Treasury "may" remit or mitigate the forfeiture and establishes no limitation on the Secretary's exercise of that discretion. 19 U.S.C. 1618. The claimant therefore has no entitlement to relief on any particular set of facts, and the Secretary's decision to deny relief in a given case is unreviewable. Hence, the remission procedure does not create a "property" interest.

By the same token, internal Customs Service guidelines concerning the disposition of remission petitions do not create an entitlement to relief that invokes due process protection. These guidelines, which were not even made available to the public until several years after respondent's remission petition was acted upon, expressly "are not mandatory"; their purpose is to promote equitable and uniform results among the various decisionmakers within the agency, not to confer on a claimant any right to a particular disposition. To construe these guidelines as creating a constitutionally protected property interest, contrary to the agency's intent, would be counterproductive because it would simply encourage the agency to eliminate the guidelines.

The conclusion that there is no independent property interest in the remission proceeding does not mean that an individual's property can be seized and forfeited without due process. The Due Process Clause applies to the deprivation of the claimant's ownership interest in the seized property, and therefore he has a right to a hearing on the question of forfeitability. But the basic premise underlying the remission petition is the assumed forfeitability of the property, which extinguishes the claimant's ownership interest, and therefore there is no independent property interest in the remission proceeding to which due process rights can attach. Of course, Congress and the agency ordinarily can be expected to establish fair procedures for decisionmaking, which is in fact precisely what has happened in the remission context. In the absence of a property interest, however, these procedures are not constitutionally compelled.

II.

A. Even if due process protections do apply to the remission procedure, those protections should not include a right to a speedy disposition. Due process basically guarantees that a proceeding be fair; the exact contours of the protections vary according to the demands of the situation. A right to a speedy disposition is not ordinarily considered one of the basic due process protections, and it is particularly inappropriate in the remission context. Because it is a given of the remission proceeding (as distinct from the forfeiture proceeding) that the property is forfeitable (and forfeited property becomes owned by the government as of the time it is seized), delay in processing a remission petition does not deprive the claimant of the use of *his* property. The property belongs to the government, which may decide—in its discretion—to remit all or part of its value to the claimant. Therefore, the right to speedy action found necessary by the Court with respect to the institution of judicial forfeiture proceedings (see *$8,850*, 461 U.S. at 563-565), where the ownership of the property is in dispute, is inappropriate in the remission context.

In fact, a constitutional right to prompt disposition of a remission petition would have the perverse effect of undermining the primary goal of the Due Process Clause —promoting fair and reasoned decisionmaking. Adequate consideration of the merits of a remission petition may entail time-consuming investigation of relevant facts; in addition, to assure equitable results the Customs Service has established review procedures, which also require time. Moreover, the sheer number of remission petitions processed (more than 50,000 each year) makes it impossible for Customs to give each one proper attention in the short time frame contemplated by the court of appeals.

The decision below, however, elevates speed above all other considerations in the processing of remission petitions. Because the agency cannot predict with any confidence whether a court will ultimately find a particular decisional time frame to be too long, the decision below places tremendous pressure on Customs to dispose of petitions as quickly as possible. In this context, where the decision is committed to the agency's unfettered discretion and is unreviewable, the logical response for Customs would be simply to deny all petitions that it cannot definitely determine to grant in very short order. The ultimate result would be that many cases that are now settled administratively would instead be referred for judicial forfeiture proceedings. This would place added burdens on the government and the courts; even more important, it would seriously disadvantage claimants, for most of whom the remission process is their only realistic hope of reacquiring any of their property.

B. Even assuming that there exists a constitutional right to speedy disposition of a remission petition, that right could not possibly have been violated in this case. First, respondent has not alleged that he was prejudiced by the delay in his ability to secure relief from forfeiture; however, prejudice is ordinarily a necessary element of a due process claim. *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). The court of appeals therefore erred in applying the four-factor test of *Barker* v.

Wingo, 407 U.S. 514 (1972), as if this were a claim under the Speedy Trial Clause.

In any event, proper application of the *Barker* factors establishes that no constitutional violation occurred here. Under *Barker*, only a delay that is so long as to be "presumptively prejudicial" triggers consideration of the other factors (407 U.S. at 530). In the speedy trial context, which involves a serious loss of liberty, delays of less than seven months generally are considered too short to warrant triggering more detailed inquiry; in the due process context, the Court has recognized that even longer delays are not presumptively prejudicial. The 36-day delay here does not even approach the level at which a serious question of unconstitutional delay requiring resort to the full *Barker* analysis might be presented.

Finally, the focus of the court of appeals' *Barker* analysis is completely misdirected. The court looked at the prejudice resulting from the *seizure* itself, not that resulting from the delay in processing the remission petition, which is the alleged constitutional violation. The fact that respondent was inconvenienced by having the car seized at the border and was deprived of its use for a few days before he posted a bond (see Pet. App. 12a) was a direct result of his actions in attempting to bring his car across the border without declaring it, thus making the car subject to seizure and forfeiture. This inconvenience and deprivation was not a product of any delay in acting on the remission petition. Unless the remission decision is made sooner than the claimant is likely to be able to procure substitute transportation, which is plainly not practical, it cannot possibly alleviate any of the "prejudice" relied on by the court of appeals, and hence that prejudice is quite irrelevant here.

In sum, proper application of the *Barker* factors manifestly requires denial of respondent's claim. The delay was quite short. It seems likely that it was justified by the need to investigate and assess the merits of respondent's remission petition. Respondent did not assert his desire for a speedy disposition of the petition; indeed, his

filing of a detailed supplement plainly belies such an intent. And there is no suggestion how the delay in acting on the petition could possibly have prejudiced respondent in his ability ultimately to receive a favorable resolution (see *$8,850*, 461 U.S. at 569-570) or in any other way.

ARGUMENT

Respondent was discovered by Customs officials attempting to bring a $24,500 foreign automobile into the United States without declaring it. It is undisputed that those officials were authorized to seize the automobile because of this violation of 19 U.S.C. 1497 and that the automobile was forfeitable to the United States. See Pet. App. 4a n.3, 20a-22a, 37a, 39a. Pursuant to its discretionary authority conferred by statute, however, the Customs Service granted respondent substantial relief on his petition for remission or mitigation, agreeing to mitigate the severity of the forfeiture and remit $20,900 to respondent, thus imposing a modest penalty of $3,600 for the statutory violation. The court of appeals has nevertheless held that the Constitution may relieve respondent entirely of liability for his misdeed—even the greatly mitigated penalty imposed by Customs. The court concluded that the time taken to rule on respondent's petition for remission and mitigation—36 days from the filing of the petition and 13 days after respondent filed an extensive supplement—violated the Due Process Clause in the absence of a particularized justification for the delay. The result is that he may be excused from the mitigated penalty and, indeed, even the payment of customs duty on the automobile.

The court of appeals' decision is erroneous in several respects. First, because the remission and mitigation remedy is purely one of administrative grace, its existence does not give rise to a property interest to which the protections of the Due Process Clause attach. An individual's ownership interest in property, of course, provides him with a constitutional guarantee that the property will not be seized or forfeited without due process. This constitutional protection, however, does not

extend to the procedures for mitigation, under which the government may elect to forgo the full forfeiture to which it is entitled and allow an individual to retain some portion of the value of the forfeited property. Second, even if the Constitution does extend due process protection to the mitigation decision, it does not require a speedy disposition. Finally, even if the Due Process Clause protects against undue delay in disposition of remission petitions, the action on respondent's petition was swift enough to satisfy any conceivable requirement of prompt disposition that the Constitution might impose.

I. THE ADMINISTRATIVE REMEDY OF REMISSION AND MITIGATION OF FORFEITURE DOES NOT IMPLICATE ANY PROPERTY INTEREST AND HENCE IS NOT SUBJECT TO THE DUE PROCESS CLAUSE

A. A Government Decision Concerning Conferral Of A Benefit Does Not Involve A "Property" Interest Unless The Government Is Bound To Take Specified Actions On The Basis Of Particular Findings

The Fifth Amendment provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." While the procedural protections conferred by this clause are broad-ranging, it is well established that they do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group:

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations.

Greenholtz v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979), citing *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976). By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a person of "life,"

"liberty," or "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972). The government's discretionary decision whether to mitigate a forfeiture cannot result in a deprivation of "property," and hence the requirements of the Due Process Clause have no application here.

It is axiomatic that "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state [or federal] law.'" *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 5 (quoting *Board of Regents* v. *Roth*, 408 U.S. at 577). See also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161 (1980). In various contexts, this Court has repeatedly faced the question whether a particular government program creates a property or liberty interest cognizable under the Fifth Amendment. From these cases, the clear rule has emerged that only when the government binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts does a "property" or "liberty" interest exist that receives the protection of the Due Process Clause.[8]

In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), for example, the Court held that the state government had created a liberty interest in the provision of good-time credits to prisoners (resulting in earlier release) and therefore that a decision to deprive a prisoner of his

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[8] While there has been considerable disagreement on the Court as to the extent to which *liberty* interests exist as inherent basic freedoms independent of any specific statutes or regulations (see, *e.g.*, *Hewitt* v. *Helms*, 459 U.S. 460, 481-488 (1983) (Stevens, J., dissenting); *Greenholtz*, 442 U.S. at 18-20 (opinion of Powell, J.)), it has never been disputed that *property* interests flow solely from positive law. Even commentators critical of the Court's approach to cases involving "liberty" claims concede that "property" is much more appropriately defined solely as the creation of the state. See Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others under the Burger Court*, 59 N.Y.U. L. Rev. 482, 529-530 (1984).

good-time credits was subject to the constraints of the Due Process Clause. The basis for the "liberty interest" was that the state statute conferred a right to good-time credits and specified that the right could be "forfeited only for serious misbehavior" (418 U.S. at 557), thus creating a statutory entitlement to the credits unless a factual finding of serious misbehavior was made.[9] By contrast, in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), the Court held that due process rights did not attach to the decision to transfer a state prisoner to another facility. The crucial distinction from *Wolff* was that these transfers "are not conditioned upon the occurrence of specified events" (*Meachum*, 427 U.S. at 226-227 (footnote omitted)); rather, "prison officials have discretion to transfer [an inmate] for whatever reason or for no reason at all" (*id.* at 228). The Court concluded that "no Due Process liberty interest of a duly convicted prison inmate is infringed when he is transferred * * * absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events" (*Montanye*, 427 U.S. at 242). See also *Olim* v. *Wakinekona*, 461 U.S. 238, 248-251 (1983); *Jago* v. *Van Curen*, 454 U.S. 14, 20-21 (1981); *Greenholtz*, 442 U.S. at 10.

In *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S 458 (1981), the Court applied this analysis in a situation closely analogous to the remission context. Under Connecticut law, the Board of Pardons is empowered to commute life sentences by reducing the minimum prison term, thereby accelerating eligibility for parole. An inmate whose request for commutation had been rejected brought suit alleging that the Board's procedures did not comport with due process; to support his claim that the Board's decision infringed a "liberty" interest,

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[9] See also *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (statutory right to remain free on parole unless specific terms violated); *Goss* v. *Lopez*, 419 U.S. 565 (1975) (right to attend public school unless guilty of misconduct).

the inmate asserted that he had a reasonable expectancy that his sentence would be commuted because 75% of all commutation requests were granted by the Board.

The Court, however, unequivocally rejected the contention that the Board's decision implicated a liberty interest protected by the Due Process Clause. The Court explained that there were "no explicit standards" for the commutation decision (452 U.S. at 466), *i.e.*, the Board was "not required to act on prescribed grounds" (*id.* at 467); rather, the Board of Pardons was invested with "'unfettered discretion'" (*id.* at 466). Therefore, the Court concluded that the petition for commutation "in each case is nothing more than an appeal for clemency * * *; it is simply a unilateral hope" to which due process protections do not attach (*id.* at 465). The Court particularly emphasized that "[n]o matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections; * * *. The ground for a constitutional claim, if any, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency" (*ibid.*). See also *id.* at 467 (Brennan, J., concurring); *Leis* v. *Flynt*, 439 U.S. 438, 444 n.5 (1979).

B. The Remission And Mitigation Remedy Is Purely A Matter Of Executive Grace And Therefore Does Not Implicate The Due Process Clause

1. *The statute establishing the remission and mitigation remedy does not create a property interest*

The statutory source of authority to remit or mitigate Customs forfeitures is 19 U.S.C. 1618, which provides that the Secretary of the Treasury "*may* remit or mitigate the [forfeiture] upon such terms and conditions as he deems reasonable and just" (emphasis added) if he finds a lack of culpable intent or "the existence of such mitigating circumstances as to justify" a reduction or elimination of penalty. The permissive language of the statute makes clear that the remedy is completely at the discretion of the Secretary, who may refuse relief to a petitioner who acted without culpable intent or may

grant it to one who acted with intent to defraud, if the Secretary finds "such mitigating circumstances" as support relief. In short, no set of facts that respondent could have demonstrated would have entitled him to any relief from the Secretary, because nothing in the statute requires the Secretary to grant mitigation under any particular set of circumstances.[10] Indeed, over 150 years ago, this Court described the Customs remission process as a "subject submitted to [the Secretary's] sound discretion." *United States* v. *Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825).[11]

The mitigation statute therefore is just like the sentence commutation statute involved in *Dumschat*. It gives the claimant no more than the ability to "appeal for clemency" (452 U.S. at 465); the disposition of that appeal is committed to the unfettered discretion of the Secretary of the Treasury or his delegate. Not only has Congress failed to impose any criteria that bind the Secretary, it has not provided any mechanism at all for review of his decision. It is undisputed that the courts lack jurisdiction to review the Secretary's action on a petition for remission or mitigation. See *United States* v. *Morris*, 23 U.S. (10 Wheat.) at 285; *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *United States* v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States* v. *One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), cert. denied, 409 U.S. 980 (1972); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964). In sum,

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[10] By contrast, in *Greenholtz* the Court found that the mandatory language of the statute—specifying that the Board of Parole "shall" order release unless certain specified conditions were met—created an entitlement to release that invoked due process protections. 442 U.S. at 11-12. See *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. at 466-467.

[11] The statute under consideration in *Morris* was couched in language quite similar to the present statute. See 23 U.S. (10 Wheat.) at 285, 291-292; Act of Mar. 3, 1797, ch. 13, 1 Stat. 506 *et seq.* See also Act of May 26, 1790, ch. 12, 1 Stat. 122 *et seq.* (original remission statute).

this unreviewable, purely discretionary, administrative determination whether to mitigate a lawful forfeiture is purely a matter of executive grace. Because the claimant has no entitlement to relief in any situation, there can be no deprivation of property and hence the protections of due process are not implicated. See *Olim* v. *Wakinekona*, 461 U.S. at 250.

It must be emphasized that the question of the applicability of the Due Process Clause to the remission decision is quite distinct from the question of the procedures required in connection with the *forfeiture* of the seized property. Plainly, respondent had a property interest in his automobile at the time it was seized. The Constitution guarantees that he cannot be deprived of that property interest without due process of law, and he is entitled to a full-fledged judicial hearing before his property is declared forfeited. See generally *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983).[12] Indeed, under *$8,850*, respondent or any claimant has due process protection against unreasonable delay in the forfeiture proceeding.

But that basic property interest in the automobile has nothing to do with the remission decision. The remission proceeding "presupposes that the offence has been committed" (*United States* v. *Morris*, 23 U.S. (10 Wheat.) at 291), *i.e.*, it is premised on the assumption that the property is indeed forfeitable. The only question is whether the Secretary will choose to remit to the claimant all or part of the value of the forfeited property.[13]

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[12] Certain classes of forfeitable property are subject to administrative (or summary) forfeiture. The claimant has the option, however, of contesting forfeiture of such property in a judicial proceeding if he posts a bond to cover the costs. 19 U.S.C. 1607, 1608, as amended by Pub. L. No. 98-573, Tit. II, § 213(a)(4) and (5), 98 Stat. 2984-2985.

[13] Obviously, if the seized property is not forfeitable it cannot be forfeited, and the claimant has no need for the remission proceeding.

Therefore, the claimant's property interest in the seized property is not implicated in the remission proceeding. That interest is completely extinguished by the forfeitability of the property. This point is perhaps best illustrated by examining the hypothetical situation presented if Customs procedures provided that the remission petition must be filed *after* the judicial forfeiture proceeding. The claimant would have the same interest in getting a speedy decision in that situation as he does here; conceptually, the two situations are not different. But it is clear that his prior ownership would give him no property interest in the outcome of the remission proceeding. Thus, the only due process question involved here is whether the existence or structure of the remission proceeding creates an independent property interest that implicates constitutional protections. See *Greenholtz*, 442 U.S. at 7 (basic liberty interest in avoiding confinement extinguished by conviction; liberty interest in parole must derive from different source).[14]

2. *Customs Service regulations concerning the processing of remission petitions do not create a property interest*

As discussed above, it is clear that Congress did not establish any entitlement to relief when it conferred by statute upon the Secretary of the Treasury the discretionary authority to grant remission. This Court has held, however, that such an entitlement, even if not required by statute, also may be created by administrative regulations that impose mandatory criteria for particular determinations. *Hewitt* v. *Helms*, 459 U.S. 460 (1983).

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[14] It cannot seriously be contended that the Constitution requires that remission or mitigation relief be available. The forfeiture statute would be valid even if the remission remedy of 19 U.S.C. 1618 were repealed, in which case respondent would have forfeited the full value of his automobile. If respondent's property interest in his automobile is not sufficient to require even the existence of a remission procedure, it follows *a fortiori* that it cannot alone operate to require particular procedural protections once Congress has elected to mitigate the harshness of the forfeiture statute by providing such a remedy.

In *Hewitt*, the Court held that the Pennsylvania prison regulations governing administrative segregation of prisoners created a liberty interest because of their "repeated use of explicitly mandatory language in connection with requiring specific substantive predicates" for the decision. 459 U.S. at 472. The guidelines established by the Customs Service for ruling on remission petitions, however, plainly do not create any property interest that invokes due process protections.

When respondent filed his petition for remission, there were no regulations governing the disposition of his request, but there were internal guidelines within the Customs Service that sought to promote uniform decisionmaking. See generally 48 Fed. Reg. 30098 (1983); 47 Fed. Reg. 7409 (1982). Purely internal guidelines such as these, however, cannot give rise to a constitutionally protected property interest. First, because the guidelines are not public or otherwise known to the claimant, they cannot provide him with any expectation of relief on a given set of facts. Regardless of the facts of his particular situation, he still has no more than a "unilateral hope" (*Dumschat*, 452 U.S. at 465) of obtaining mitigation of the forfeiture. See also *Greenholtz*, 442 U.S. at 11-12; *Montanye* v. *Haymes*, 427 U.S. at 242. Moreover, while such internal guidelines plainly are intended to guide the determinations of persons to whom duties have been delegated, they cannot bind the statutorily-designated decisionmaker himself. Since they are not even distributed outside the agency, internal guidelines exist and are applied solely at the discretion of the head of the agency who promulgated them. Thus, in this case, regardless of the degree of discretion conferred by the internal guidelines that were in use, the discretion of the Secretary of the Treasury to rule on remission petitions remained unfettered, as provided by statute. Accordingly, the guidelines could not confer upon respondent any entitlement to relief. See *Olim* v. *Wakinekona*, 461 U.S. at 249-250.

Subsequent to the events involved in this case, the Customs Service extensively revised its guidelines for

ruling on remission petitions filed in connection with violations of 19 U.S.C. 1497, and it has now made the revised guidelines available to the public. 48 Fed. Reg. 30098 (1983); 19 C.F.R. 171, App. A. The guidelines identify certain mitigating and aggravating factors to be taken into account and establish a range of appropriate remission decisions depending on the presence or absence of these factors. Even these guidelines, however, do not create a property interest because they do not bind the government to take any specific action on a remission petition. By their terms, the guidelines "provide a framework and procedure by which violations of 19 U.S.C. 1497 are to be analyzed. They are not mandatory in the sense that they must be absolutely applied" (§ III.1.). Rather, they allow the decisionmaker to retain discretion to depart from the guidelines for reasons that he deems appropriate. Thus, in contrast to *Hewitt* where the relevant regulations "used language of an unmistakably mandatory character" (459 U.S. at 471) and left no room for the use of administrative segregation in the absence of specific substantive predicates, the regulations here explicitly state that they are not mandatory. See also *Olim* v. *Wakinekona*, 461 U.S. at 250 n.10. The intent of the Customs guidelines plainly is to promote fair and uniform dispositions among the various persons who rule on remission petitions, not to establish a right of the claimant to any particular disposition.

As a general rule, the courts should be extremely hesitant to infer the creation of a property interest from regulations promulgated by an agency in furtherance of its duty to exercise discretionary authority conferred by statute. Even where official action is intrinsically subjective, judgmental, or discretionary, it is ordinarily sound governmental practice to attempt to achieve rationality and consistency of action through the use of written guidelines.[15] This Court has characterized the channel-

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[15] By the same token, publication of such guidelines may in some circumstances be beneficial to both the government and the public. In this case, for example, the publication by the Customs Service of

ling of decisionmaking in this manner as a "salutary development." *Hewitt* v. *Helms*, 459 U.S. at 471. But, as noted above, the establishment of such guidelines does not necessarily evidence a decision to guarantee particular action on any particular set of facts and thereby to create a property interest. If the promulgation of guidelines is deemed, contrary to the agency's intent, to embrace the full panoply of constitutional due process protections, the unfortunate result may be to discourage the government from issuing such guidelines altogether. See *ibid.*; *United States* v. *Caceres*, 440 U.S. 741, 755-756 & n. 24 (1979).

In this case, for example, if the guidelines issued by the Customs Service were deemed to create a property interest, which in turn imposed upon the agency a requirement of speedy disposition of remission petitions that it considered unduly burdensome, a logical response for the agency would be to eliminate the guidelines and return to a regime of less consistent decisionmaking.[16] Thus, in considering whether agency regulations themselves create a property interest, the touchstone of the inquiry should be the agency's intent in promulgating those regulations; imposing procedural requirements contrary to that intent is unwarranted and likely to be counterproductive.[17] Here, the guidelines themselves

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the factors that it considers relevant in exercising the Secretary of the Treasury's discretionary authority to rule on remission petitions will help ensure that claimants address those factors in their remission petitions and therefore draft the petitions in the manner that is most useful to the Customs Service and to the claimants themselves.

[16] The costs to the agency of maintaining the guidelines would go well beyond the administrative burdens imposed by additional due process protection. The possibility that agency action on remission petitions would be found to violate the Constitution raises the dual dangers that, as here, a valid forfeiture will be nullified and that individuals may be subject to *Bivens* suits (see note 27, *infra*).

[17] The question whether government action creates a property interest is distinct from the question of what process is due once

make it crystal clear that they were not intended to create any due process rights.

The conclusion that a claimant lacks a property interest in the disposition of his remission petition and hence that the Due Process Clause is not implicated does not mean that arbitrary decisionmaking will be unduly encouraged. On the contrary, quite apart from constitutional constraints and judicial oversight, both legislature and executive have an independent interest in providing a fair and efficient decisional process. With respect to petitions for remission, the Customs Service has established a multi-step investigation and review process [18] that provides that the final decision be reflected in

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a property interest has been created. If an individual has a property right, he may not be deprived of that property without due process, *as guaranteed by the Constitution.* The government does not have the power to create a property interest and condition it upon submission to constitutionally inadequate procedures. See *Cleveland Board of Education* v. *Loudermill,* slip op. 6-8. Thus, the question whether a property interest exists turns largely on the intent of the government; the question of what process is due for the deprivation of a property interest is a constitutional one to which the intent of the government appears to be largely irrelevant.

[18] The procedures for processing petitions for remission of forfeiture, which are set forth in the U.S. Customs Service, Dep't of the Treasury, *Fines, Penalties and Forfeitures Handbook* 116-119 (rev. 1979), provide that: (1) upon receipt of a petition, an "FP&F" officer examines the document to determine whether further investigation is needed; (2) if he determines that further investigation is required, he prepares a request for investigation and forwards it to the district director; if additional investigation is not deemed necessary, he prepares a memorandum for the district director recommending a final determination based upon guidelines and applicable precedent; (3) in cases where further investigation is deemed necessary, the district director may refer the case to the Customs Office of Investigation, which will further investigate the allegations contained in the petition or obtain the information specified by the district director; (4) following the investigation, the customs investigator files a report with the district director; (5) upon completion of the investigatory and review processes, the district director decides the action to be taken on the petition and advises the petitioner of the decision in a written opinion that includes a statement of the findings of fact and the reasoning on

a written opinion that includes a statement of findings of fact and reasons.[19] Indeed, respondent has never suggested that he was denied a fair adjudication or that he did not receive due process, apart from the question of speedy disposition.[20]

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which the decision relies. A disappointed petitioner may, as respondent did, obtain administrative review from the Regional Commissioner. 19 C.F.R. 171.33(b). For seizures valued at more than $25,000, there is an additional level of review; the final decision on the petition is made by Customs' Washington, D.C. headquarters or, if the seized items are valued at more than $100,000, by the Department of Treasury (Pet. App. 48a-49a).

It is clear, of course, that the institution of particular *procedures* by an agency does not itself operate to create a property interest. *Olim* v. *Wakinekona*, 461 U.S. at 250-251; *Hewitt* v. *Helms*, 459 U.S. at 471.

[19] The specific requirement that the written opinion contain findings of fact and a statement of reasons was established in 1978 to conform Customs practice generally with the new requirements imposed by amended 19 U.S.C. 1592. Thus, this requirement was not in force at the time respondent filed his petition.

[20] The internal Customs procedures for processing remission petitions do not establish any specific time frames for decision-making. A claimant is not powerless, however, to obtain a speedy resolution of the question of his interest in the property. If delay in processing the administrative petition for remission or mitigation is unreasonable under the Administrative Procedure Act, the claimant may file suit to attempt to compel the agency to act. 5 U.S.C. 706(1); see note 30, *infra*. If the delay is not "unreasonable" under the statute, but has become inconvenient for the claimant, he may, of course, seek prompt judicial forfeiture proceedings. See *$8,850*, 461 U.S. at 569; *Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817); *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672, 674-675 (5th Cir. 1976). Indeed, Customs regulations now provide that cases "will be referred promptly to the United States Attorney for institution of judicial proceedings" "unless the petitioner provides an express agreement to defer judicial or administrative forfeiture proceedings until completion of the administrative process." 19 C.F.R. 171.11(d). The referral of the case to the Department of Justice for the institution of a forfeiture action will result in the forwarding of the petition for remission to the Department of Justice for decision as well. 19 C.F.R. 171.24(a). In any

The Constitution simply was not designed to oversee every aspect of governmental decisionmaking. See *Greenholtz*, 442 U.S. at 7; *Bishop* v. *Wood*, 426 U.S. 341, 349-350 (1976). When Congress enacts a procedure that creates no entitlement, but rather operates solely as a matter of administrative grace, an individual's procedural protections are established not by the Constitution but by the political processes as reflected in the procedures accorded by Congress itself or by the agency. Cf. *Heckler* v. *Day*, No. 82-1371 (May 22, 1984) (noting congressional consideration of wisdom of imposing deadlines on disability benefit eligibility determinations); *Board of Regents* v. *Roth*, 408 U.S. at 578-579 (noting that opportunity for hearing in connection with employment nonretention may be appropriate even though not constitutionally required).[21]

II. EVEN IF DUE PROCESS PROTECTIONS DO ATTACH TO THE REMISSION PROCESS, THE PERIOD OF TIME TAKEN TO CONSIDER RESPONDENT'S PETITION DID NOT VIOLATE THOSE CONSTITUTIONAL PROTECTIONS

A. Due Process Protection For Remission Petitions Does Not Include A Right To A Speedy Disposition

1. *There is no need to create a constitutional right to a prompt disposition in order to ensure fundamental fairness in the remission context*

Even assuming that the existence and structure of the remission procedure is deemed to create a property interest, it does not necessarily follow that due process requires a speedy disposition. A conclusion that Fifth Amendment protections apply to the consideration of a

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event, the claimant retains the right to raise a due process objection to the delay in the forfeiture proceeding itself.

[21] If the procedures initially adopted by an agency for discharging its responsibilities are unfair or ineffectual, it is likely that pressures will be brought to bear, through public complaint or legislative oversight, to improve them.

remission petition means that some process is due, but it does not answer the question whether the required process encompasses a right to a speedy disposition of that petition. Due process is a "flexible" concept that "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Basically, due process guarantees that a proceeding be fair; "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). As noted above, the Customs Service has established detailed procedures for the equitable processing of remission petitions, and respondent, who filed both an initial remission petition and a detailed supplement prepared with the assistance of counsel, has not complained that he was given an inadequate opportunity to present his case and never complained during the administrative process that a decision was being unreasonably delayed.

It is true, of course, that the procedural protections provided by the Due Process Clause must be provided "at a meaningful time" (*Armstrong* v. *Manzo*, 380 U.S. at 552) and therefore that, in some contexts, delay theoretically can violate due process (see *Barry* v. *Barchi*, 443 U.S. 55, 66 (1979)). But unless a delay is so lengthy (or the benefit in question so time-sensitive) that the delay has the practical effect of seriously undermining the usefulness of the decision, the right to a speedy disposition is not ordinarily considered one of the essential attributes of due process. Thus, even in situations where the property or liberty deprivation is considerably more serious than that involved here, the Court has repeatedly found no constitutional problem with decisional processes that take significantly longer than the few weeks involved in this case. For example, in *Cleveland Board of Education* v. *Loudermill*, slip op. 13-14, the Court found no constitutional problem with an unexplained delay of nine months in providing a post-termination hearing con-

cerning the correctness of a decision to discharge a person from employment. In *Mathews* v. *Eldridge*, *supra*, the Court recognized that the hardship imposed by a termination of Social Security disability payments was "significant" (424 U.S. at 342), but it nonetheless found no due process problem with the postponement of the required hearing until more than a year after termination of the benefits (*id.* at 341-343). See also *Heckler* v. *Day*, slip op. 15 (characterizing court-imposed deadlines for consideration of disability claims as an "unwarranted judicial intrusion").

The Court has recognized a due process right to a speedy disposition in two contexts, but those decisions highlight the inappropriateness of finding a due process prohibition against delay here. In *United States* v. *Lovasco*, 431 U.S. 783 (1977), the Court found that a delay in bringing an indictment could, in certain limited circumstances, give rise to a due process violation. The Court's holding was limited to the situation where the government conduct violated standards of "fair play and decency," such as an intentional delay designed to gain a tactical advantage over the defendant, and where the delay prejudiced the defendant's ability to present his case at trial. See *id.* at 795-796. And in *$8,850*, of course, the Court held that undue delay in providing a forfeiture hearing could violate due process because of the deprivation of the use of the seized property. 461 U.S. at 563-565. In both cases, however, the Court found that a decisional delay of 18 months did not violate due process.

The remission context is fundamentally different from the above situations, and there is no need to create an independent constitutional right to a speedy disposition in order to guarantee due process in the administrative proceeding. The basis for the right to a speedy judicial forfeiture proceeding recognized in *$8,850* is the fact that the claimant is deprived of the use of the property—to which he may have a valid claim—until the hearing is held to resolve the forfeitability of the property. In other words,

a delay in the forfeiture proceeding results in a temporary deprivation of the claimant's property in the event that the property ultimately is held not to be forfeitable. By definition, however, delay in the remission proceeding cannot result in the deprivation of use of the claimant's property. The underlying premise of a remission petition is that the property is forfeitable;[22] the claimant seeks to have the penalty eliminated or reduced because of mitigating factors. In essence, the claimant concedes that the property belongs to the government, but, as a matter of executive grace, he requests that part of the forfeited value be remitted to him. Indeed, the courts have recognized that when the property is forfeitable, it becomes the government's property as of the time of seizure. See *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). Plainly, the claimant should have no distinct constitutional right to speedy disposition of his remission petition (as opposed to a determination of the forfeitability of the property) when he is not being deprived of the use of *his* property during the pendency of the petition. Because the property in question is recognized—for purposes of the administrative remission proceeding—as belonging to the government, delay in that proceeding cannot affect a property interest of the claimant.

2. Importing constitutional time constraints on the consideration of remission petitions will adversely affect the interest of claimants in obtaining remission or mitigation

The creation of a due process right to a speedy disposition of a remission petition is not only theoretically

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[22] If the claimant wishes to contest forfeitability, *i.e.*, the assumption that it is the government that has the legitimate claim of ownership of the property, the forfeiture hearing is the place to do so. There, the Due Process Clause protects his right to a reasonably prompt determination. By the same token, if the claimant has any objection to the lawfulness of the seizure, he may file a motion for return of property under Rule 41(e) of the Federal Rules of Criminal Procedure.

unsound, it is unwise as a practical matter because it would actually disserve the primary goal of the Due Process Clause. The general purpose of due process protections is simply to promote fairness; more specifically, their "primary function * * * is to minimize the risk of erroneous decisions." *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979); see generally *Mathews* v. *Eldridge*, 424 U.S. at 335. Obviously, that purpose is undermined in the remission context if the decisionmaker is not given adequate time to consider the merits of a petition. But the drastic consequences of a finding of a due process violation in the remission process as a result of delay—*i.e.*, barring imposition of any penalty for smuggling even though there is no challenge to the substantive validity of the penalty [23]—creates a strong pressure on the decision-

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[23] In the event that the delay here is found to be a due process violation, it nevertheless cannot be a proper remedy for respondent to be absolved of all liability for his violation of the law—in effect a dismissal with prejudice of the forfeiture action. See *United States* v. *Morrison*, 449 U.S. 361 (1981). Punitive damages against the government are not permitted, so any remedy must be limited to whatever damage respondent actually suffered as a result of the violation. It seems apparent that there was no such damage here. Theoretically, a delay could prejudice the claimant's ability to defend against the forfeiture action, but there is no allegation that such was the case here; indeed, the court of appeals agreed that the property was forfeitable (Pet. App. 4a n.3). In any event, any prejudice to the defense of the forfeiture action ought to be subsumed within an *$8,850* claim of undue delay in processing the forfeiture, not the remission. It is difficult to imagine how the delay conceivably could prejudice the claimant's chances of getting favorable action on the remission petition itself and, again, there is no such allegation here. The only damage that it seems a claimant could suffer from a delay in the remission proceeding is the loss of the use of the money for the period of undue delay, *i.e.*, interest (which assumes that he has some right to remission at a given time in a given amount). Respondent has not alleged how he was harmed at all by the 36-day period taken to rule on his petition, much less how he could have been harmed to the tune of $3,600 (the mitigated penalty) or $24,500 (the amount of respondent's liability if he had declined to accept the offer of mitigation). Thus,

maker to place speedy disposition above all other considerations, at the expense of a careful weighing of the merits of the petition. In general, when a judicial standard of a reasonably prompt determination is imposed, the administrative agency has no way of knowing what amount of time might later be considered "reasonable" by the courts. Indeed, because of the strain that enormous numbers of remission petitions place on the limited manpower available to process them, it is likely in this context that what the agency perceives as reasonable speed in processing a petition sometimes will be found by a court, which looks only at the case before it, to have been unreasonably slow. Therefore, if a due process right to a speedy disposition is imposed, the Customs Service would have a strong incentive to rule on remission petitions as quickly as possible, even if it has not had the opportunity to give them adequate consideration, in order to avoid the possibility of litigation and perhaps invalidation of its forfeiture on the ground of undue delay.

This general problem inherent in any right to a speedy disposition is exacerbated here because of the extremely short time frame apparently contemplated by the court of appeals. In its original decision, the court stated that 24 hours ought to be the maximum time available for considering remission petitions in ordinary cases (Pet. App. 31a-32a); in its second decision, the court drew back from this rigid position, but still strongly intimated that the 36 days involved here was far too long (*id.* at

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it appears that under no circumstances can he be entitled to recover more than an insignificant interest award or nominal damages. See *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978).

In the absence of any genuine damage, allowing respondent to escape liability for his infraction because of delay in processing his remission petition is a completely unjustified windfall that undermines the congressional purpose to strike at customs violations through the pocketbook of the offender. It is tantamount to using mere delay as a basis for estopping the government from enforcing the law, which this Court has unequivocally rejected. See *INS* v. *Miranda*, 459 U.S. 14, 18 (1982).

7a-12a). This approach reflects a complete failure to appreciate the practicalities of the remission process and the steps that must be undertaken in order to provide equitable and reasoned disposition of petitions. Indeed, if Customs itself had adopted regulations requiring disposition with such haste, we think the increased risk of arbitrary decisionmaking inherent in such procedures would make them far more vulnerable to due process attack than the existing procedures.

As described above (note 18, *supra*), the Customs Service has established detailed procedures for processing remission petitions. Customs often must investigate the basis for the factual allegations in the petition and make other inquiries, which may concern events and circumstances beyond those at the site of the seizure or submission of the petition. As detailed in an affidavit executed by the Director, Entry Procedures and Penalties Division, Office of Regulations and Rulings, United States Customs Service (Pet. App. 41a-50a), which was filed with the government's rehearing petition, there are numerous factors that are relevant in deciding the extent to which relief should be granted.[24] An assessment of these factors may require factual investigation, which requires both time and manpower. The Director's affidavit states that most decisions on petitions for remission normally take more than 30 days and, in a large number of cases, at least three to six months is needed for Customs to collect the information necessary to make an informed decision even if it gives high priority to an application over other pending matters (*id.* at 45a, 47a, 49a).

Indeed, the factors that necessitate more extended consideration of petitions than the court of appeals seems

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[24] For example, Customs considers whether the violation occurs in connection with a commercial shipment or an importation for personal use; whether the petitioner has a previous record for Customs or criminal violations; whether the violation was negligent or willful; and the validity of a claim that forfeiture would create an extraordinary financial hardship (Pet. App. 46a-47a).

willing to accept are well illustrated by this case. See Pet. App. 47a-48a. A responsible decision on respondent's petition required at a minimum an inquiry (that could potentially extend all the way to Switzerland) into respondent's ownership interest in the seized vehicle, which was registered in the name of Grace Blote, its intended recipient (C.A. App. 11), and the possibility that the vehicle was being brought into this country for commercial purposes. In addition, the District Director was required to consider respondent's allegations that the Customs inspector had never asked him whether he had anything to declare and that respondent lacked any intent to avoid paying his customs duty (J.A. 12, 15-16). To evaluate these claims required at least some inquiry into respondent's background, which could not reasonably be based exclusively on respondent's self-serving statements about his reputation and the amount of duty he had paid on other occasions. See J.A. 12, 16. Taking into account the enormous number of remission petitions that must be processed,[25] it is difficult to see how Customs can be condemned for taking five weeks to reach a decision on this petition. The fact that the court of appeals has found this time frame inadequate graphically illustrates the difficult position in which the Customs Service is placed by the due process right created below and manifests why the agency will be impelled in the future to reach remission decisions as hastily as possible, at the expense of informed and reasoned decisionmaking.

The fact that the remission decision is committed to the Secretary of the Treasury's unreviewable, unfettered discretion makes it even less appropriate to impose a constitutional requirement of a speedy disposition in the remission context. It is undoubtedly true that a claimant may desire a prompt ruling on his remission petition even if he has no opportunity to seek review of that decision and

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[25] The Customs Service processes more than 50,000 noncontraband forfeitures per year, and petitions for remission or mitigation are filed in 90% of those cases. *$8,850*, 461 U.S. at 558. Thus, close to 200 petitions are filed on an average work day.

even if it turns out to be unfavorable. See *Johns* v. *McKinley*, 753 F.2d 1195, 1203 (2d Cir. 1985).[26] But that does not mean that it is sensible policy to have a speedy disposition requirement. If there are reviewable standards that govern an administrative decision, the pressure to forgo careful consideration of that decision in order to satisfy a timeliness requirement is balanced somewhat by the possibility that a hasty, ill-considered decision may be reversed on appeal. Here, however, there is no countervailing requirement that would keep the Secretary from giving short shrift to petitions in order to avoid violating a speedy disposition requirement. Under the court of appeals' decision, there is nothing that prevents the Secretary from rendering completely arbitrary decisions so long as they are speedy. Indeed, the most logical response to the severe time constraints imposed by

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[26] Contrary to the view of the *Johns* court, this desire does not provide a basis for finding a property interest in the outcome of the remission proceeding that generates a constitutional right to a speedy disposition. The fact that the claimant wants a prompt resolution of his petition, just like the fact that he wants and expects a favorable resolution of his petition because many other petitions are granted as a matter of practice, does not create a property interest. His desire is just a "unilateral hope" (*Dumschat*, 452 U.S. at 465; see also *Board of Regents* v. *Roth*, 408 U.S. at 571); he has no entitlement to any particular disposition of his petition either with respect to the merits or the timing. Those are matters left to the Secretary's discretion. See Part I, *supra*. By the same token, for reasons discussed above (pages 19-20, *supra*), the *Johns* court errs in holding (753 F.2d at 1202-1203) that the claimant's original ownership interest in the seized vehicle established a property interest in the remission proceeding. First, the ownership of forfeitable property is transferred to the government as of the time of the seizure. *United States* v. *Stowell*, 133 U.S. at 16-17. Second, the remission proceeding is premised on the assumption that the claimant no longer has a legitimate claim to ownership of the property. Hence, the original ownership interest is assumed to have been extinguished, just like a prisoner's undeniable pre-conviction liberty interest in being free from confinement (*Greenholtz*, 442 U.S. at 7), and it can provide no basis for attaching the protections of the Due Process Clause independently to the remission proceeding. Thus, the efforts of the *Johns* court to distinguish *Dumschat* are unavailing.

the decision below would be for the Secretary simply to deny petitions that he cannot definitely decide to grant in very short order.[27] The matter would then be referred under 19 U.S.C. 1603 to the United States Attorney for the institution of judicial forfeiture proceedings (or, if the value of the seized property is small, would proceed to administrative forfeiture proceedings).

Thus, the ultimate result of the due process right established by the court of appeals is that many cases that are now settled administratively would instead be resolved in forfeiture proceedings.[28] This result runs contrary to the congressional purpose in establishing the remission and mitigation remedy, which is designed to promote administrative, rather than judicial, resolution of claims resulting from Customs seizures. Moreover, increasing the number of cases resolved through judicial proceedings, instead of through the less formal and less costly remission procedure, will impose substantial burdens on the government and on the courts that must

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[27] Failing to act on a remission petition with speed (or haste) sufficient to satisfy a reviewing court can have adverse effects beyond the loss of the forfeiture. Both courts of appeals that have found a constitutional right to speedy disposition of a remission petition have also found that that right can easily give rise to personal *Bivens* liability for government officials, ranging from a relatively lower-level official such as a Customs Service District Director (*Seguin* v. *Eide*, 720 F.2d 1046 (9th Cir. 1983), on remand from 462 U.S. 1101 (1983), vacating and remanding 645 F.2d 804 (9th Cir. 1981)) to the head of the seizing agency (*Johns* v. *McKinley*, *supra*), even in the absence of intentional misconduct.

[28] The Director's affidavit in this case states that in 95% of car seizure cases in which remission petitions are filed, the case is settled administratively without the necessity of instituting forfeiture proceedings, *i.e.*, the vehicle is returned upon payment of a mitigated amount (Pet. App. 49a). If the decision below induces Customs to act on all petitions within 30 days, even when that period is insufficient to make an informed decision to grant relief, many of these cases (perhaps as many as 70% (*id.* at 49a, 50a)) would be denied administratively and referred for forfeiture proceedings instead of being settled administratively through the remission process.

adjudicate those proceedings. See *$8,850*, 461 U.S. at 566; *Ivers* v. *United States*, 581 F.2d at 1370.

Most important, reducing the number of cases settled through the remission procedure will seriously disadvantage the claimants themselves. Ordinarily, and this was certainly true in respondent's case, a claimant's only realistic hope of reacquiring any of his seized property is the remission process. The circumstances of the seizure of the property are usually such that judicial proceedings will inevitably result in a finding of forfeitability—and the forfeiture proceeding is an all-or-nothing affair. Thus, speedy denial of a remission petition because of time constraints is rarely in the claimant's best interest. See *$8,850*, 461 U.S. at 566.[29] In sum, the effect of creating a constitutional right to a speedy disposition of a petition for remission or mitigation is antithetical to the basic goals of due process—promoting fair and error-free determinations—and is actually adverse to the general interests of claimants as a class. Hence, even if there is some due process protection that attaches to the remission procedure, the protection "called for" in that context (*Morrissey* v. *Brewer*, 408 U.S. at 481) does not include a right to a speedy disposition.[30]

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[29] Ordinarily, if property is declared forfeited in a judicial proceeding, the claimant has the option of filing a petition for remission or mitigation with the Attorney General. 28 C.F.R. 9.1 *et seq.* Such a petition will not be entertained, however, in cases where an administrative petition was filed with the Secretary of the Treasury and denied. 28 C.F.R. 9.3(g).

[30] This is not to say that a claimant has no remedy if the Customs Service unreasonably delays acting on a petition for a considerable length of time. Under the Administrative Procedure Act, the claimant can bring a suit to compel agency action that is "unreasonably delayed." 5 U.S.C. 706(1). The remedy available in such a suit would be responsive to the complaint; the agency would be ordered to act promptly if it is delaying unreasonably. See *Heckler* v. *Day*, slip op. 15 n.33. There is no justification, however, for what respondent has done here under the cover of the Due Process Clause, *i.e.*, sit back quietly until the agency acts and then bring suit to alter the substantive rights of the parties by invalidating the forfeiture on the ground that the agency did not act quickly enough.

B. Even If A Constitutional Right To A Speedy Disposition Of A Remission Petition Does Exist, The Processing Of Respondent's Petition Did Not Violate That Right

Even assuming, contrary to our primary submission, that the Due Process Clause does guarantee a claimant the right to a speedy disposition of his remission petition, the court of appeals' conclusion that that right could have been violated in this case cannot possibly be correct.

1. At the outset, we believe that the court erred in assuming that respondent's claim should be governed by reference to the four-factor test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), for assessing alleged violations of the Speedy Trial Clause. The due process protection against undue delay found here by the court is most closely analogous to the due process protection against excessive preindictment delay recognized in *United States* v. *Lovasco*, *supra*. In *Lovasco*, the court not only found that a due process claim could not be pressed unless the government conduct violated standards of fair play and decency, it also noted that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." 431 U.S. at 790. The right of prompt disposition recognized by the court of appeals here, which does not appear to depend at all on the existence of prejudice and certainly is not limited to cases of government misconduct, generally is appropriate only when considering rights conferred by a specific provision of the Constitution and not when applying the general protections of the Due Process Clause.

The Court did suggest in *$8,850* that a due process claim based on delay might be possible in some circumstances in the absence of demonstrable prejudice, but that conclusion makes sense only in the specific context involved in *$8,850*, which, as the court of appeals itself recognized (Pet. App. 6a-7a), is significantly different from that involved here. The judicial forfeiture proceeding—the timing of which was at issue in *$8,850*—is the final step in the legal path triggered by the seizure

of forfeitable property. It therefore was logical for the Court in *$8,850* to look for guidance to cases arising under the Speedy Trial Clause, an analogous situation involving the delay in holding the final step (the trial) in the chain of judicial events triggered by an indictment. But the claim here is not analogous to a speedy trial claim; a petition for remission or mitigation is an optional, and collateral, administrative remedy that plainly is not automatically set in motion by the seizure of forfeitable property. Hence, despite *$8,850*, a due process claim of delay in acting on a petition for mitigation ought not to be resolved by immediately invoking the *Barker* factors. Instead, some showing of prejudice caused by the delay ought to be a prerequisite to the claim, just as *Lovasco* holds that prejudice is a prerequisite for a claim of preindictment delay.

2. Even assuming that the court of appeals was correct in applying the *Barker* factors to determine whether a delay in ruling on a remission petition violates due process, the court manifestly erred in holding that application of those factors to this case could possibly result in finding a violation. The court of appeals' analysis of the four factors grossly deviates from the approach contemplated in *Barker* and *$8,850*.

a. Under the four-factor analysis set forth in *Barker* v. *Wingo*, *supra*, the length of the delay is a factor that "triggers" consideration of the other factors. 407 U.S. at 530. In other words, unless the delay in question is so long as to be "presumptively prejudicial" (*ibid.*), the speedy trial claim is rejected without the need to consider the other factors. It seems apparent that the amount of delay needed to trigger the *Barker* balancing test in the speedy trial context ought to be considerably less, at least in the absence of unusual circumstances, than that needed to trigger the test in the forfeiture remission context. First, in the speedy trial context the claim is based on a specific constitutional provision that guarantees a speedy disposition, as compared to the general protections of the Due Process Clause. Moreover,

the deprivation in the speedy trial context that gives rise to the constitutional claim—loss of liberty—is considerably more grievous than the alleged deprivation of property in the remission context. See *$8,850*, 461 U.S. at 565 n. 14. Be that as it may, even if the identical standards ought to be applied in these disparate contexts, it is manifest that 36 days is altogether too short a period of time to trigger consideration of the other *Barker* factors. See, *e.g.*, *United States* v. *Struyf*, 701 F.2d 875, 879 (11th Cir. 1983) (seven month delay does not trigger consideration of other *Barker* factors); *United States* v. *Nance*, 666 F.2d 353, 360 (9th Cir.), cert. denied, 456 U.S. 918 (1982) (five months); *United States* v. *Elorduy*, 612 F.2d 986, 988 (5th Cir. 1980) (six months). See also *United States* v. *MacDonald*, 456 U.S. 1, 11 (1982).

The cases that have considered allegations of a due process violation (as opposed to a violation of the Speedy Trial Clause) based on delay confirm that the time frame here was entirely too short even to raise the possibility of a constitutional violation. In both *$8,850* and *Lovasco* a delay of 18 months was held insufficient to establish a due process violation.[31] In *Cleveland Board of Education* v. *Loudermill*, slip op. 13-14, the Court found that a nine-month delay, without more, did not raise a due process question. See also *Mathews* v. *Eldridge*, 424 U.S. at 341-343 (recognizing validity of delay of more than a year between termination of disability benefits and required hearing). Against this background, it seems manifest that the court of appeals erred in concluding that a delay of less than six months in processing a remission petition could even trigger consideration of the *Barker* factors, much less actually establish a due process violation. A fortiori, there can be no constitutional violation in this case, where the delay in question was of a wholly

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[31] In *$8,850*, the Court did find that the 18-month delay was sufficiently long to trigger consideration of the other factors of the *Barker* balancing test.

different order of magnitude, a mere 36 days.[32] In sum, the unreasonably short time frame imposed by the court of appeals would not further due process; the pressure it would impose on the agency "would subordinate the goal of 'orderly expedition' to that of 'mere speed.'" *Lovasco*, 431 U.S. at 795 (quoting *Smith* v. *United States*, 360 U.S. 1, 10 (1959)).

3. In addition to the fact that the court of appeals erred in holding that the short delay here triggered consideration of the other *Barker* factors, the court seriously erred in its application of those factors. The analysis contemplated by the court of appeals and "suggested" to the district court (Pet. App. 9a-12a) is completely misdirected because it fails to focus on the conduct that is actually alleged to constitute the due process violation. The court looked to the prejudice resulting from the *seizure* itself, such as the potential consequences of depriving an individual of a means of transportation for an extended period of time (see Pet. App. 12a), but

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[32] The absurdity of the court of appeals' conclusion that the Customs Service acts unreasonably when it takes 36 days to investigate and rule upon a petition for remission or mitigation is highlighted by examining the time frames that ordinarily attach to other steps in the process that is set in motion when property is seized as forfeitable. The claimant, who presumably is fully conversant with all the facts surrounding the seizure and hence need not spend any time investigating, is allowed 60 days just to file his petition for remission or mitigation. 19 C.F.R. 171.12(b). If the case is not settled administratively, the Court has held that there is nothing inherently objectionable in 18 months' delay before the judicial proceeding is instituted (*$8,850, supra*), let alone decided by the district court. And other judicial proceedings in connection with the forfeiture, such as appeals, also may take a considerable length of time. For example, in this case the 36 days taken to act on the remission petition seems somewhat insignificant in light of the fact that the case remains in litigation more than ten years after respondent's vehicle was seized. Almost four years passed between the filing of respondent's complaint and the original decision of the district court (J.A. 1-3). Respondent's appeal from that decision was pending in the court of appeals for two years (J.A. 6-8), and it took the court of appeals an additional ten months to rule on the case a second time after it was remanded by this Court (J.A. 9-10).

the alleged due process violation arises not from the seizure at all, but from the time taken to process a petition for remission. It must be remembered that the class of cases under consideration involves vehicles for which there is probable cause to believe that they have themselves been smuggled into the country (as here) or have been employed for the transportation of illegal drugs or other contraband. Generally, the claimant has no basis for objecting to the seizure itself.[33] The purpose of the remission process is simply to consider whether there are extenuating circumstances that might justify amelioration of the penalty of forfeiture. In short, a person who attempts to smuggle a vehicle or contraband across the border should be held to have assumed the risk of any inconvenience that might result from its seizure and has no right to raise a constitutional objection based on that inconvenience. If a due process violation is claimed because of excessive delay in the remission process, it must be based on the prejudice resulting from that delay, not from the seizure.

This pervasive error by the court of appeals renders meaningless much of its *Barker* analysis. For example, one of the four *Barker* factors is whether the defendant (or, here, the claimant) asserted his right to a speedy disposition. 407 U.S. at 528-529, 531-532. This factor was recognized by the Court as an important one; it noted in *Barker* that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial" (*id.* at 532). Here, the court of appeals disposed of this factor quite simply, stating that respondent "filed his petition for remission at the time his vehicle was seized, which seems a sufficient assertion of his rights" (Pet. App. 11a). To be sure, the mere filing of a remission petition almost certainly demonstrates the claimant's unhappiness with the seizure and his desire to avoid, if possible, forfeiture of the total value

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[33] If the lawfulness of the seizure is being disputed, the forum provided for that inquiry is a motion for return of property under Fed. R. Crim. P. 41(e).

of the seized property. But it does not say anything about the claimant's expectations or demands with respect to the timing of the ruling on the petition, which is the crucial issue in this setting. The issue presented here cannot arise unless a remission petition is filed, so the court of appeals' approach has the effect of eliminating one of the *Barker* factors by weighing it in favor of the claimant in every case.

In fact, the circumstances here strongly indicate that respondent did not assert his "right" to a disposition of his remission petition in less than 36 days, nor did he desire such a speedy resolution. After he filed his initial handwritten petition (J.A. 12), respondent retained counsel and filed a detailed supplemental petition, less than two weeks before his petition was acted upon. And respondent sought further administrative review of the mitigation decision when it was issued (J.A. 18-19). Had Customs acted upon respondent's remission petition within three weeks, *i.e.*, before the supplemental petition was filed, he might well have complained that the hasty action deprived him of due process. At any rate, respondent took no action that could reasonably be construed as an assertion of a right to a speedy disposition of his remission petition.

The court of appeals' discussion of prejudice, which ought to be a prerequisite to any due process claim here (see pp. 37-38, *supra*), is similarly flawed. The court did not suggest any way in which respondent was prejudiced in his defense of the forfeiture action or the resolution of the remission petition—the kind of prejudice recognized as relevant in *$8,850*. See 461 U.S. at 569-570; see also *Lovasco*, 431 U.S. at 789-790, 796. The court noted that the claimant may be prejudiced by inconvenience or disruption of travel plans caused by the seizure (Pet. App. 12a). In particular, the court emphasized the severe prejudice inherent in a vehicle seizure because it leaves a traveler stranded "without transportation at a remote border point" (*id.* at 10a; see *also* id. at 26a). But such a claim of prejudice can be

material only to the decision whether due process requires action within *hours* of a seizure—a rule the court of appeals itself recognized on remand as inappropriate.[34]

A due process rule that allows even a few days to investigate and act upon the petition will not help the claimant with his "stranding" problem because, in any event, the decision will come when he is no longer stranded. Needless to say, a claimant is not immobilized at the border during the entire period his remission petition is pending. Procedures exist to permit the claimant to obtain the return of his vehicle; he can post a bond in the amount of the value of the vehicle. That is what respondent did in this case, two weeks after the seizure, at which time the Jaguar was released to him (Pet. App. 19a). Indeed, there is nothing in the record to show why he could not have posted a bond and obtained possession of the car within a day or two had he wished to do so.[35]

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[34] In its original decision, the court of appeals stated that remission decisions would be presumed to be unconstitutionally tardy if they were issued more than 24 hours after the filing of the petition (Pet. App. 31a-32a). The court wisely drew back from that impossible standard in its decision on remand. It seems likely that in many cases 24 hours would not even be enough time for the decisionmaker to receive the petition filed at the border, much less have an opportunity to investigate its allegations and reach a reasoned decision. The court's original 24-hour standard, however, sheds some light on the court's narrow focus on the immediate inconvenience of the seizure in its consideration of the *Barker* factors. If remission or mitigation is granted within 24 hours, the inconvenience to an individual of losing his car can be alleviated by that administrative decision, and therefore it makes some sense to characterize a failure to reach a decision within 24 hours as prejudicing the claimant's ability to travel. But once the 24-hour standard is abandoned, the factors relied upon by the court of appeals manifestly become completely irrelevant. Once it is conceded that the remission process may extend beyond the day or two necessary for the claimant to post a bond for his car or otherwise obtain substitute transportation, further delay does not leave him "stranded at the border" or otherwise interfere with his ability to travel.

[35] Respondent stated to the Customs officer at the time of the seizure that it would be "no problem" for him to obtain the funds

Moreover, even before respondent reclaimed possession of his car, it can hardly be said that he was left stranded at the border. On the contrary, the Customs agent arranged for transportation for respondent to the nearest town, from which respondent arranged to fly home in his private plane, which was waiting in Seattle (Tr. 51-52). In other words, the "prejudice" relied upon by the court of appeals was essentially unrelated to the timing of the remission decision; that prejudice would have been unchanged even if the remission decision had been rendered considerably faster. The inconvenience suffered by respondent when his effort to escape paying duty on a $24,500 foreign automobile was thwarted was fairly ascribable to his own misdeed and not to any unfairness in the processing of his petition for administrative clemency.

In sum, examined in the proper light, *i.e.*, focusing on the delay in processing the petition, the *Barker* v. *Wingo* factors cannot possibly be found to support a due process claim in this case. The length of the delay was entirely too short to suggest any constitutional deficiency. This short delay was almost certainly ascribable to the need to investigate the contentions raised by and assess the merit of respondent's petition for remission.[36] Respondent did not assert a right to, or desire for, a speedy disposition of his remission petition. Finally, there is no suggestion how the delay in acting on the petition (as distinct from the seizure itself) could possibly have preju-

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to secure release of the car (Tr. 157, 159). Moreover, respondent testified that he was familiar with Customs "informal entry" procedures that would have required him to post a bond in the amount of the value of the car in order to be allowed to go on his way (Tr. 67).

[36] The reasons for the delay thus far have never been at issue in proceedings in the district court, and therefore they are not reflected in the record. Nonetheless, the court of appeals found it appropriate to "suggest" to the district court that "[i]t appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition" (Pet. App. 11a).

diced the claimant in a manner analogous to that contemplated in *$8,850—i.e.*, in reducing his chances for a favorable disposition of his remission petition (see 461 U.S. at 569-570)—or, indeed, in any other way. Respondent's complaint boils down to no more than the desire to receive a sum of money sooner—money that indisputably is the property of the government and to which he had no legal entitlement.[37] In short, the court of appeals' remand order, with its suggestion that the district court could find a due process violation because of the 36-day consideration period in this case, is gravely flawed.[38]

Moreover, the broader implications of the court of appeals' application of the *Barker* factors to the facts of this case are quite disturbing. In essence, the court of appeals has distilled *Barker* into a single factor test for delays in acting on remission petitions. Since, under the court's analysis, even a very short delay triggers the inquiry, the mere filing of the petition satisfies the demand requirement, and inconvenience caused by the seizure is treated as prejudice caused by the delay, it would appear that three of the *Barker* factors will be weighed in favor of the claimant in almost every case of this

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[37] Thus, despite the court of appeals' suggestion that its rule may be restricted to the seizure of automobiles, the logical implication is that the due process right created below would apply equally to the processing of remission petitions in connection with the seizure of any other goods.

[38] The error of the court of appeals' decision may perhaps most clearly be demonstrated by considering what the analogous rule would be as applied to seizure of the person—an event surely as inconvenient to the individual as the seizure of his automobile. Under such a rule, an individual who had been arrested on probable cause to believe he had committed a crime and who asked the prosecutor to consider a plea bargain or dismissal of all charges could not be prosecuted at all if the prosecutor failed to give a final response to such a proposal within the short time frame suggested by the decision below. No one would seriously propose such a rule in the case of arrests, and we are at a loss to understand why it should apply to seizures of property.

kind. The due process question will turn entirely on the reasons for the delay. If Customs can show that, under the circumstances, it could not possibly have acted on the petition more quickly, the due process claim will be denied. Otherwise, the claim will be granted and the forfeiture invalidated. This formula for excessive judicial intrusion into the administration of a remedy of executive grace perverts the Due Process Clause and, if allowed to stand, can be expected to yield hasty decision-making to the detriment of the government and claimants alike.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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